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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. BRIAN RICHARD DORISH, Defendant and Appellant.	G052320 (Super. Ct. No. 10HF1006) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Thomas M. Goethals & Cheri T. Pham, Judges. Affirmed.

Law Offices of E. Thomas Dunn, Jr., and E. Thomas Dunn, Jr., for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Charles C. Ragland, Scott C. Taylor and Allison V. Hawley, Deputy Attorneys General, for Plaintiff and Respondent.

Brian Richard Dorish molested his girlfriend's young son over a two-year period. A jury convicted him of seven sexual offenses, and the court sentenced him to an aggregate term of 50 years-to-life in prison. On appeal, Dorish contends the trial court erred by denying his pretrial discovery request for a DNA database search of genetic material collected from a semen stain found in one of the many locations Dorish molested his victim. Testing revealed the DNA did not belong to Dorish, the victim, or the victim's biological parents. Dorish argues the court's ruling violated his state and federal due process rights, depriving him of a fair trial because he had no opportunity to identify "the specific third person or persons responsible for and linked to the crimes for which [he] stood accused, and for which he now stands convicted, with the result that [he] will serve the rest of his natural life living on the taxpayers' dime in a level four California State Prison facility." Finding his contentions on appeal lack merit, we affirm the judgment.

I

A. Factual Summary

In 2007, the victim (J.N.) and his family moved into the same neighborhood as Dorish. At the time, J.N. was approximately five years old and in kindergarten. In 2008, J.N.'s mother (Mother) began dating Dorish and separated from J.N.'s father (Father), who was in the army and stationed overseas. In September 2009, Mother moved into a one-bedroom apartment, where Dorish was present almost every day. Father never entered the apartment.

Over this two-year period, Dorish and J.N. played baseball and games together, they joked around, ate candy, and went to the park. Dorish attended J.N.'s award ceremonies at school. J.N. believed Dorish was a "fun guy" and grew to love him. He was happy when he learned Dorish and Mother planned to marry.

During the same time period, when Dorish and J.N. were alone together, Dorish touched J.N.'s penis or had J.N. touch his penis. Dorish and J.N. orally copulated

each other. J.N. stated the incidents happened in the closet, behind the couch, on J.N.'s bed, in Dorish's bedroom, and while the family was on a cruise ship vacation. J.N. recalled Dorish would bribe him with games and "stuff" to touch Dorish's penis. If J.N. resisted, Dorish would grab his wrist and pull his hand to his penis. J.N. explained Dorish convinced him that no one would believe him if he reported the molestations because he was only a kid. Mother frequently questioned J.N. if he was being touched inappropriately, and J.N. would tell her "No." He offered several explanations for keeping the molestation a secret. He initially did not realize the conduct was wrong, he was embarrassed to talk about it, he thought Mother or Father would punish him, and he was scared of losing the games, candy, and other rewards Dorish gave him for his acquiescence.

The molestation began when J.N. was five years old. J.N. recalled he did not initially understand the sexual conduct was wrong until he began attending school and heard his seven-year-old classmate, Max, boast about having sex. Max described sexual acts between women and men.

On June 3, 2010, Mother asked Dorish to babysit J.N., who was sick and staying home from school. She left J.N. sleeping on her bed when she went to drop off his sister at school. When she returned, Dorish was laying on her bed and J.N. was in the bottom corner of his sister's bunk bed and looked at Mother in a "very different way." Alarmed, Mother asked if he was okay and beckoned him to sit with her on the living room couch. She stated he seemed different and because of his body language she wanted to ask if something had happened with Dorish while she was gone. Dorish appeared surprised to see Mother when she returned to the apartment, and indicated he thought she was going straight to work after dropping off her daughter.

While still in the bedroom, J.N. stated Dorish had tickled him. However, when he spoke with Mother on the couch, J.N. said Dorish had touched his penis. Mother asked Dorish about J.N.'s accusations, with J.N. listening to the conversation.

Dorish denied touching J.N. Mother was shocked when then seven-year-old J.N. boldly and loudly countered by arguing Dorish had done it. Later during the conversation, Dorish stated he maybe touched J.N. by accident. The next day, Mother reported all that had happened to the police.

At trial, the jury heard J.N.'s interviews with the police and the Child Abuse Services Team (CAST). J.N. stated he was currently a second grader. He said Dorish tickled him sometimes on his armpit and other times on his penis. He explained Dorish would "wiggle" his penis when his was undressed. J.N. stated, "I don't like it. I try to grab my clothes." J.N. maintained Dorish undressed him, despite his efforts to tell him no and push him away. Dorish told J.N. not to tell Mother.

J.N. stated Dorish would sometimes put him in a room and lock the door. The few times J.N. tried to scream, Dorish put his hand over J.N.'s mouth. Dorish touched J.N.'s penis while watching television or in bed. J.N. recalled Dorish rubbed J.N.'s penis with a teddy bear, and they rubbed their penises together. J.N. also described how Dorish had "sucked" his penis over 40 times and wanted J.N. to orally copulate him as well. J.N. explained he did not orally copulate Dorish as frequently as Dorish orally copulated him. J.N. stated, "But I don't wanna [sic] do it and sometimes he just puts my head to it too." He explained, "He would grab my head like this and suck it and don't wanna [sic] I can't sometimes I can't breath and sometimes I tried to hit him . . . ." When Dorish put his penis in J.N.'s mouth, J.N. would try a wrestling move his Father taught him. "I tried . . . beating him up, 'cause [sic] I couldn't breathe." When asked if this helped, J.N. replied, "When I am fighting him yeah, he pulled me up because uh, it was hurting him."

In the interview, J.N. provided a detailed description of how Dorish's penis differed in size, color, and appearance from his own. Dorish would tell J.N. he liked being touched and would grab and move J.N.'s hand the way he wanted. J.N. did not recall seeing anything come out of Dorish's penis. However, at trial, J.N. testified Dorish

ejaculated during some of their encounters. When cross-examined about this inconsistency with his prior statements, J.N. stated he answered the question truthfully when he was seven years old. He did not know "what it was before," and he first learned about ejaculation in the third or fourth grade. He previously said nothing came out of Dorish penis "because I didn't even know what it was. I thought it—it was like sweat or something. How am I supposed to know?"[1]

In the interview, J.N. acknowledged various sexual acts did not occur, such as kissing, anal contact, watching pornography, or taking photos and videos. At trial, J.N. admitted Father was an angry person, but he denied Father told him to make up allegations about Dorish. Mother corroborated the circumstances surrounding the cruise, occasions when Dorish and J.N. were alone together, and the gifts of candy and games.

After the interviews, Mother made several recorded pretext phone calls with Dorish. The jury received recordings and transcripts of the conversations. In the calls, Dorish repeatedly denied doing anything inappropriate with J.N. He also frequently asked to meet with Mother in person because he was concerned someone was listening to the call. Dorish asked Mother if she was going to file a police report and was highly suspicious about whether she had spoken to anyone about J.N.'s allegations. He tried to persuade her that if she did make a report then her angry ex-husband would try to take her children away from her. He explained it would happen not because she was a bad mother, but because she was "a horrible mom to have a horrible boyfriend." He frequently asked Mother not to call the police or file a report.

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[1] Appellant's counsel described the inconsistent testimony at length in the opening brief's factual summary. Counsel added a footnote to offer his own "response" to J.N.'s claim he did not understand what ejaculation meant. Counsel wrote, "He could have checked with Max." Max was J.N.'s seven-year-old classmate. We note this sort of inappropriate side commentary was pervasive throughout the opening brief. It served no valid purpose.

Mother told Dorish that J.N. reported the molestation at school and he was going to be interviewed. In their next phone conversation, Dorish wanted to know what J.N. said and told Mother that she should have talked to J.N. before the interview and told him what to say.

In all the conversations, Dorish repeatedly stated he loved Mother and the children and they could work things out. Mother encouraged Dorish by saying she loved him and wanted for them to be a family. At one point, Mother stated she loved Dorish but never thought he "would do that." He replied, "I know. I know." Mother responded, "Never crossed my mind. But you did . . . ." Dorish was then heard to be crying.

Later in that conversation, Dorish stated he wanted to marry Mother in Las Vegas, and Mother replied he first needed to "get help." She asked if something similar had happened to him. Dorish reluctantly agreed that "together" they would maybe get professional help. Mother repeated Dorish needed help and she would rather give him "a chance for what [he] did" than see him go to jail. Dorish replied, "But you cannot make any phone calls or file anything, cause [sic] I don't want . . . you [to] lose your kids to your ex-husband."

Because Dorish was reluctant to discuss anything on the phone, Mother agreed to meet him at Starbucks with a recording device in her purse. The sound quality of the tape was very poor and only portions of the conversation could be transcribed. Dorish's response was inaudible when Mother asked if he touched J.N. However, Mother testified Dorish nodded affirmatively. Mother asked Dorish, "Is that a yes?" because she wanted clarification. Mother recalled he whispered, "I am sorry, sorry."

At another point in the conversation, Mother asked Dorish not to hide from her and stated her son did not tell lies. She asked if Dorish was calling her a liar. The following exchange occurred:

"[Dorish]: I'm not calling you a liar, (inaudible).

"[Mother]: What do you want to tell me? What else did you want to say?

"[Dorish]: It was nothing. I just (inaudible). (Inaudible), you know, like horsing around, playing around, or kidding around, you know, or whatever in the bath. Nothing -- Nothing--.

"[Mother]: Honey, -- (inaudible). I love you.

"[Dorish]: I know, honey, but hey, that's what happened.

"[Mother]: If you want to lie to somebody else -- lie to somebody else. (Inaudible), please, I beg you.

"[Dorish]: (Inaudible).

"[Mother]: I beg you, [Dorish], I beg you.

"[Dorish]: (Inaudible).

"[Mother]: It happened one time? What, without clothes? Please, [Dorish], tell me.

"[Dorish]: (Inaudible).

"[Mother]: Because--

"[Dorish]: (Inaudible.) Yeah, but it's an accident. Okay? Nothing (inaudible). Okay? (Inaudibile.)

"[Mother]: Okay. I'm thinking it's one time. (Inaudible.) (Inaudible.) I'm here. I'm not going. It hurts; I know. I'll stay here. I love you, too, honey. We'll work it out as a family and you'll call us a family. We'll work it out together and I want you to be okay.

"[Dorish]: I want to be okay too, and I want (inaudible)."

At trial, Mother was asked about this conversation, and she testified Dorish admitted to molesting J.N. only one time. When Mother suggested family counseling because it would be confidential, Dorish expressed concern "[t]hey could report it."

Later in the conversation, Mother told Dorish that she was afraid and scared for J.N. Dorish replied, "He's going to be fine. Okay?" Dorish further assured Mother, "Yeah, he will. It will take time but he'll be fine. Okay? I'm serious. Okay? I'm

thinking if you're behind him, then he won't even remember. Okay? I'm serious. Okay." Mother asked, "He'll forget about it?" Dorish replied, "Yeah. He will. Okay? It wasn't a repeat thing, over and over and over and over and over again. So it's not in his mind like that. Okay?" (Inaudible.) All right? You and I can talk to him. Okay? You and I can talk to him. Okay?"

During their meeting, Mother said J.N. "has a wonderful heart" and Dorish "hurt it." Dorish stated, "And he got hurt. And make sure that you tell him that you talked to me and everything will be okay and [Dorish] and I agreed, you know, there's no more—nothing. Okay? If he wants to see me, I would love to see him when he's ready. Okay? He'll be fine. I'm sure of that. Kids get over everything. (Inaudible.) It's nothing that horrible, that happened, okay? (Inaudible)."

In his next sentence, Dorish returned to his mission of controlling Mother's interactions with law enforcement. He stated, "But you need to let me know, if they call (inaudible) come in and questioned, or whatever." He told Mother they should keep each other informed about what was going on and asked her, "They haven't called you the whole week?" Mother indicated "they" only asked if everything was okay. Dorish stated, "Keep it that way." When Mother asked if Dorish did not think the authorities took J.N.'s story seriously, he replied, "I'm thinking whatever it is, we're on the same side and nothing happened." He added, "I mean I don't want anything to happen to me or you or [J.N.] or anybody. I don't want you to lose your kids or anything." He told Mother, "You have to protect him and you and me."

Police searched Mother's apartment. Stephanie Callian, a forensic scientist working for the Orange County Crime Lab, used a special light and identified multiple stains containing bodily fluids on J.N.'s pillowcase and in his closet. The sample taken from the closet included a mixture of sperm and epithelial cells containing both male and female DNA. DNA testing excluded Dorish, Mother, Father, and J.N. as the source of the closet sample. The sample from J.N.'s pillowcase contained sperm cells. However,

Callian was not able to isolate the sperm cells from the surrounding DNA, and as a result, she was only able to identify J.N.'s DNA on his pillowcase.

B. Defense Case

The defense called forensic psychologist, Laura Brodie, as an expert on the "suggestibility" of children and the dynamics of social workers interviewing children. She discussed how a single-minded questioning technique was suggestive and could lead a child in a particular direction. She explained, "[W]hen the interviewer follows just one path . . . they continue to confirm what the child has said before by staying on that path instead of offering branches to where they may disconfirm what the child has said." She noted that once J.N. identified Dorish, he was not asked if the perpetrator could have been someone else. In addition, Brodie explained that when an authoritative adult, such as a mother, is constantly asking the same question, it can create "suggestibility." She acknowledged numerous other techniques for analyzing whether a child was susceptible to suggestion during an interview. However, she agreed challenging the child in a sexual abuse case might not be a practical technique because research studies confirm it could discourage the child from giving more details about what happened.

The defense also called Robert Binz, a forensic scientist for the Orange County Crime Lab, and Blaine Kern, an expert in DNA analysis. They confirmed the areas tested for DNA consistently excluded Dorish as a contributor. Binz acknowledged the individual sperm cells found on the pillowcase could not be isolated and tested for DNA. Kern conducted an independent analysis of the testing reports and obtained his own samples from the bedding for testing.

They jury also heard testimony from Dorish's sister, who lived "off and on" with him and their mother. When she was at her mother's house, J.N. and his sister were often there. She never observed any inappropriate behavior. Dorish's mother testified about Dorish's close relationship with J.N. She also did not observe anything inappropriate.

C. Procedural History

The information alleged Dorish committed six counts of oral copulation or sexual penetration with a child 10 years old or younger (Pen. Code, § 288.7, subd. (b); counts 1-6),[2] two counts of forcible lewd act on a child under 14 (§ 288, subd. (b)(1); counts 7-8), and four counts of lewd act upon a child under 14 (§ 288, subd. (a); counts 9-12). With respect to counts 7, 8, 9, and 10, the information further alleged Dorish had substantial sexual conduct with a child, pursuant to section 1203.066, subdivision (a)(8).

Before trial, the court held several hearings to consider Dorish's various discovery motions. In February 2015, the court considered defense counsel's motion requesting two items. The first related to the inability of either side to determine if DNA samples taken from the pillow included sperm. Defense counsel explained this issue was important because the prosecutor intended to introduce expert testimony that a boy J.N.'s age was not mature enough to have created the spermatozoa.

The second request was for the prosecution to run the DNA found in the closet through the Combined DNA Index System (CODIS) to determine if it belonged to someone in the database.[3] The court asked why this would be relevant because although J.N. alleged Dorish molested him in the closet, Dorish was eliminated as a source of the DNA found there. Defense counsel stated, "I want to find the perpetrator of this crime. I want to find the person who molested this child. I assume we all want that answer." The

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[2] All further statutory references are to the Penal Code, unless otherwise indicated.

[3] The Federal Bureau of Investigation's (FBI) CODIS allows local authorities to match an unknown profile with individuals in the system. "CODIS collects DNA profiles provided by local laboratories taken from arrestees, convicted offenders, and forensic evidence found at crime scenes." (*Maryland v. King* (2013) __ U.S. __, 133 S.Ct. 1958, 1968.) It is a nationwide database connecting federal, state, and local DNA databanks. (See also *People v. Xiong* (2013) 215 Cal.App.4th 1259, 1266.)

court replied, "Why should I think whoever the donor of the material in the closet was involved in the molestation of the child?" The court commented it was "a leap of faith" to conclude someone else molested J.N. Counsel stated that if he knew the third party's name, an investigator could determine if it was "some guy that randomly rented the apartment or somebody known to these people."

The prosecutor asserted she was not allowed to run the material in the CODIS database because the victim was clear about who molested him. The court asked if someone from the crime lab could explain the rules to him. Callian was called to the witness stand and the parties stipulated she was qualified to testify about use of the CODIS database.

Callian explained the FBI's regulations mandated that the CODIS database could not be used in the manner Dorish proposed. She agreed CODIS could be used in cold case evaluations or when a crime had occurred and nobody knew who did it. She stated there were three tiers to CODIS and if the sample met certain criteria, it could "move to the national level." Callian explained, "So in this case specifically, this sample from the closet floor is a stain from an unknown male and female. We do have their profiles. What we did was compared the DNA profiles that we obtained to the alleged victim, to . . . Dorish, to the victim's Father and Mother, and nobody matches. . . . The sample doesn't come from a familial person." She concluded that because the sample was not associated with the crime, it was not eligible for CODIS under the FBI's regulations. When the court asked if the only basis for this conclusion was the testimony of a seven-year-old child, Callian replied, "No. The victim is also not present in the sample and it is not anybody related to him or to . . . Dorish."

In addition, Callian noted the sample was a "mixture" of a "male and female profile," indicating it was created from the sexual activity of two adults. She stated the sample was not associated with a crime and, therefore, could not be run in the database. Callian asked the CODIS administrator to also look at the data and received

confirmation the evidence was not eligible. "The FBI doesn't allow CODIS to be used for, quote, unquote, fishing. They don't allow us to enter in a sample to see if we get a hit or a lead."

The court was skeptical of Callian's explanation and stated it really did not make sense because the laboratory analyzed unknown samples every day in CODIS. The court stated, "I don't want to jeopardize your license. I respect what you do over there. But constitutional requirements override any statutory situation." It concluded, "If I believe that this, for example, was *Brady* material potentially, which has a 6th Amendment constitutional dimension, the fact that some state or federal statute said you shouldn't do it would not cause me to believe that I could not make an appropriate order to the contrary. I think the constitutional requirements override any statute whether it is federal or state. [¶] But, it sounds like what is going on is you have a theory [defense counsel], that really is not rooted in a *Brady* theory exactly. It is just information you would like to know, really not with any certainty as to what you might do with it. But it is something than an expert suggested maybe you should ask for and it might be helpful to your expert to know it. But it is speculative at best on my part to try to figure out whether that discovery could conceivably generate any sort of relevant material."[4]

The court added it appreciated "decisions that relate to discovery" do not determine "the admissibility of the material" because "discovery rights are broader than admissibility rules." However, the court concluded, "I don't think this a constitutionally based issue. I think it is more a statutory discovery issue. So given that context, I give some weight to the fact that, apparently, the crime lab people don't think that their protocol permits them to access CODIS under these circumstances. [¶] I am still, frankly . . . not sure I agree with the analysis for a lot of reasons. But I don't find the potential

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[4] In *Brady v. State of Maryland* (1963) 373 U.S. 83, 85, the Supreme Court held suppression of material evidence by the prosecution was a denial of due process.

materiality of the material great enough to fly in the face of those collateral considerations." The court denied the discovery request.

Before trial, the discovery issue came up again in the context of the prosecutor's motion in limine to exclude "evidence of sperm and epithelial cells found in a stain on the carpet inside of the [closet] that did not match any victim or witness in this case." The prosecutor maintained any connection between the evidence and the case was speculative. Initially, the court ruled to exclude the evidence under Evidence Code section 352. It later changed its mind, explaining the speculative nature of the evidence impacted the weight of the evidence rather than its admissibility. It ruled Dorish could not suggest to the jury that law enforcement did not conduct a CODIS search because they were biased against him.

At trial, the jury considered evidence about the mixture of sperm and epithelial cells, containing male and female DNA, found in J.N.'s closet. They also were informed the DNA did not match Dorish, J.N., Mother, or Father. In closing argument, defense counsel referred to the absence of DNA at any of the locations where J.N. claimed he was molested. Counsel argued the DNA in the closet was most telling about J.N.'s credibility. "This is the spot. The light's lighting up, and we got DNA and we got people there. And there is a male and a female profile there, and it's nobody in the case. But doesn't that tell you something? That's where stuff is happening. If it's, for example, people from—tenants before they even moved in you know, it's really old, it's none of the players in this, that DNA survived vacuuming, cleaning, people that lived there before. That DNA survived all of that to be found. [¶] Law enforcement didn't want to pick up previous tenant stuff; they wanted to pick up [Dorish] and [J.N.] That's what they were there to pick up, but they didn't pick it up. There're picking that stuff. [¶] So what does that tell you about the survival of evidence like that, semen/sperm? If it's nobody in this case, it's somebody before they even moved in and it still survives. What does that tell you about if [J.N.] is laying naked, [Dorish] is laying naked on that

floor on that carpet in that closet? What does that tell you about the survivability of evidence like that?"

Defense counsel acknowledged J.N. said nothing came out of Dorish's penis, on the other hand, the prosecutor was arguing there was semen on J.N.'s pillow. Defense counsel argued, "How can there not be evidence of those two people in that closet? This happened in the closet over and over and over. This isn't a one-off spot; this is all the time. That's the spot. It's got to be there. Is there any reasonable explanation why it's not there." Counsel argued at length that J.N.'s story did not "hold water as to all [that is] going on in the closet and all [that is] going on in the bed . . . [because Dorish's DNA] would have to be there."

A jury convicted appellant of counts 1, 2, 7, 8, 10, and 11 and found true the substantial sexual contact allegations with respect to counts 7, 8, and 10. With respect to count 3, the jury convicted Dorish of the lesser included offense of simple battery (§ 242). It found him not guilty of counts 4 and 9, and was unable to reach a verdict on counts 5, 6, and 12. The court sentenced Dorish to an aggregate term of 50 years-to-life in prison.

II

A. Discovery Ruling

"As a rule, a criminal defendant 'may compel discovery by demonstrating that the requested information will facilitate the ascertainment of the facts and a fair trial.' [Citation.] But the trial court has discretion '"to protect against the disclosure of information which might unduly hamper the prosecution or violate some other legitimate governmental interest,"' or when there is an '"absence of a showing which specifies the material sought and furnishes a 'plausible justification' for inspection [citations]."' [Citation.] Although policy may favor granting liberal discovery to criminal defendants, courts may nevertheless refuse to grant discovery if the burdens placed on government and on third parties *substantially* outweigh the demonstrated need for discovery.

[Citations.]" (*People v. Kaurish* (1990) 52 Cal.3d 648, 686.) We review a trial court's ruling on a discovery motion for an abuse of discretion. (*People v. Ashmus* (1991) 54 Cal.3d 932, 979, disapproved on other grounds in *People v. Yeoman* (2003) 31 Cal.4th 93, 117.)

Here, Dorish sought discovery of whether an individual having a criminal history deposited sperm in J.N.'s closet because such evidence could possibly result in third party culpability evidence. "[T]hird party culpability evidence is admissible if it is 'capable of raising a reasonable doubt of [the] defendant's guilt' . . . ." (*People v. Robinson* (2005) 37 Cal.4th 592, 625.) "[W]e do not require that *any* evidence, however remote, must be admitted to show a third party's possible culpability." (*People v. Hall* (1986) 41 Cal.3d 826, 833 (*Hall*), italics added.) [E]vidence of mere motive or opportunity to commit the crime in another person, without more, will not suffice to raise a reasonable doubt about a defendant's guilt. . . ." (*Ibid.*) "[T]o be admissible, evidence of the culpability of a third party offered by a defendant to demonstrate that a reasonable doubt exists concerning his or her guilt, must link the third person either directly or circumstantially to the actual perpetration of the crime. In assessing an offer of proof relating to such evidence, the court must decide whether the evidence could raise a reasonable doubt as to defendant's guilt and whether it is substantially more prejudicial than probative under Evidence Code section 352." (*People v. Bradford* (1997) 15 Cal.4th 1229, 1325; see *Hall, supra,* 41 Cal.3d at p. 833.)

In light of this test, we conclude there was no error. Dorish fails to explain why the identity of the man who ejaculated in the closet (the sperm donor) would be admissible. That the sperm donor engaged in sexual activities in the same closet as where the molestations occurred is the type of evidence so remote to establishing third party culpability as to justify its exclusion from evidence. Dorish cannot explain how the requested information would be relevant to show someone else was responsible for the charged molestation crimes. There is no evidence the sperm donor was a witness or was

involved in the molestations. There is nothing to suggest the sperm donor, if identified and located, would admit to knowing or molesting J.N. Evidence a non-party previously ejaculated in the family's closet is not evidence that raises a reasonable doubt as to Dorish's guilt. (*Hall, supra,* 41 Cal.3d at p. 833.) In addition, the limited probative value of the evidence was greatly outweighed by the possibility of it confusing the issues or misleading the jury. (Evid. Code, § 352.) The identity of the strangers who left their DNA establishes their sexual acts occurred in the closet, but is not evidence linking these individuals to the crime charged. And the fact Dorish's DNA was not found in the closet assisted his defense in establishing he did not perform a sexual act in that location. Dorish has not shown the court's denial of his discovery request was an abuse of discretion or denied him his rights to prepare a defense and obtain a fair trial.

Dorish failed to provide a showing of relevance in his discovery request. This case did not involve an unidentified perpetrator. J.N. played games and received candy from his assailant. He was unequivocal about who molested him. Dorish speculates that whoever ejaculated in the closet could possibly be connected with the case. He also hypothesizes Father somehow set him up. He fails to explain how these two theories are related or possibly linked. The discovery request in this case constituted "the proverbial fishing expedition" (*People v. Jenkins* (2000) 22 Cal.4th 900, 957, 997) for alternative theories, not focused specifically on a viable theory of third party culpability.

Dorish fails to appreciate that not knowing the identity of the sperm donor assisted his case. If the donor was positively identified as a prior tenant, the evidence would be completely unrelated to the molestations and the court would have granted the prosecutor's motion in limine to exclude it from trial. Not knowing the identity, Dorish's counsel constructively used the evidence as supporting the theory J.N. was mistaken because, according to his testimony, the police should have found Dorish's DNA

evidence in multiple locations in the apartment. This was not a case involving mistaken identity.

B. No Constitutional Violation

On appeal, Dorish appreciates the relevant case law that "appears to require that[] before evidence of third party culpability can be introduced at trial, a link between the evidence and the purported third party must be ascertained." (Citing *Hall, supra,* 41 Cal.3d at p. 833; *People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1174.) Dorish argues this legal test should not apply in a case like his, where a defendant needs a discovery order before he can identify the purported third party and then determine if there is a link. He argues the prosecution should not be allowed to "hold hostage" evidence "that might lead" to discovery of other helpful information. He maintains the trial court's application of the legal test of *Hall* and its progeny unconstitutionally deprived him of his constitutional right to "mount a viable defense."

As noted by the Attorney General, the *Hall* case is binding California Supreme Court precedent. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Dorish provides no analysis of the constitutionality of the *Hall* case beyond arguing he is not seeking a radical remedy or reinterpretation of a long established rule. Rather, he seeks "a fair shake here" because the prosecutor had exclusive access to the information at issue and, therefore, it would be "unfair" to saddle the defendant with the burden of establishing a link. He cites no authority directly supporting his argument. The Attorney General notes Dorish does not discuss the DNA Identification Act (42 U.S.C. §§ 14132, 14133, 14135), or the California DNA and Forensic Identification Database and Data Bank Act of 1998 (§§ 295, 299.5), and he did not argue either one unconstitutionally deprived him of the ability to present a defense.

We agree with the Attorney General's conclusion that Dorish's lengthy discussion of *Heffernan v. City of Paterson* (2016) __U.S.__, 136 S.Ct. 1412, is

misplaced. The Supreme Court held that a police officer could bring a lawsuit under title 42 of the United States Code section 1983. (*Id.* at p. 1414.) The holding has no application to the DNA discovery dispute in this case. Although the court created an exception to a general rule that would have precluded relief, it did not suggest all rules require similar exceptions. (*Id.* at pp. 1418-1419.)

Here, the requested evidence established sexual activity took place at some point in the same closet where J.N. said he was molested. Dorish was allowed to use the DNA evidence to his advantage, and the jury was well aware that none of Dorish's DNA was found in the closet. Defense counsel used this evidence to refute J.N.'s claims. Dorish's ability to present a defense was not restrained in the manner he suggests. To the contrary, as the Attorney General points out, had an identification of the couple been made, Dorish likely could not have used the evidence to support his alternative theories. We conclude Dorish failed to meet his burden of showing a constitutional violation was a demonstrable reality, rather than mere speculation.

C. Lack of Prejudice

Dorish does not discuss the issue of prejudice in his opening brief. In his reply, Dorish attempts to refute the Attorney General's assertion the evidence in this case was "overwhelming." He argues, "The People's case was based nearly entirely on the testimony of the young boy who accused [Dorish] of the molestation he says he did not know was wrong until a friend, Max, told him so (although Max had no such recollection when he testified at the close of the trial about the discussion he had with his grade-school friend, the alleged victim)." He adds, "[A]ll the prosecution had to support its case was ambiguous evidence of encouraging head nods made by [Dorish] to his then-girlfriend, who was significantly hearing impaired, when she spoke to him while wired inside a noisy Starbucks café." Dorish concludes he was left with no defense other than to suggest his accuser was being untruthful. We do not agree.

The interviews of J.N., when he was seven years old, were more than examples of overheard crude playground talk from other second graders. J.N. was able to give a detailed description of the adult male penis he was forced to touch, rub, and put in his mouth. His description of being unable to breath during oral copulation and trying to use martial arts to escape were compelling. J.N.'s credibility was bolstered by the fact he did not always answer affirmatively when questioned about sexual acts. He stated Dorish did not kiss him or touch his anus. There was no photography or pornography. Moreover, Dorish's consciousness of guilt can be inferred from comments made on the telephone and at the Starbucks café. Mother's impaired hearing was not relevant to her understanding of a silent but affirmative head movement followed by an apology. Moreover, the recorded telephone conversations show how Dorish tried to manipulate Mother into protecting him, not filing a police report, telling J.N. what to say, and meeting him in person. Dorish used the one thing Mother feared most, losing custody of J.N. to Father, as leverage to convince her to keep quiet. Finally, we find relevant the jury did not convict Dorish of all the charges. It evaluated each allegation and found Dorish guilty only of those proven beyond a reasonable doubt.

D. Other Arguments

Dorish makes numerous allegations in lengthy footnotes sprinkled throughout the summary of facts. In footnote 1, he complains matters were "complicated" by the fact four different judges considered various discovery motions over a 16-month period. Dorish concludes the lack of continuity and the trial judges' lack of familiarity allowed the prosecution to make misrepresentations. In footnote 3, Dorish gives an abstract argument of what he reargues in pages 28 through 40. Footnote 4 complains the court failed to give a cautionary instruction to the jury along with transcripts of the taped conversations, and after the verdict, one juror indicated some

panel members believed the parties stipulated the transcripts were accurate. The next footnote asserted the court erred in denying a motion for disclosure of juror identifying information. Footnote 6 raises essentially an abbreviated sufficiency of the evidence argument and prosecutorial misconduct claim, questioning why the jury did not find Max's testimony more compelling than J.N.'s recollection of their conversations. Defense counsel uses footnote 7 to malign Father's character, citing evidence suggesting verbal and physical abuse and disapproving the court's ruling to exclude evidence Father disliked Dorish. Footnote 8 returns to the question of why the jury believed J.N. and not Max, which is a credibility-type argument typically used when there is a sufficiency of the evidence argument. Footnote 9 is commentary about J.N.'s inconsistent statements about whether Dorish ejaculated. And finally in footnote 11, located after the last sentence of the factual summary, Dorish clarifies that he "disavows any attack on the sufficiency of the evidence here" and instead "is of the view that, had the prosecutor been more interested in justice than in gamesmanship and winning, she might have gone along" with the discovery request. Dorish proclaims, "[A] trial is not a game."[5]

We are unclear why so many semi-argumentative diatribes were included in footnotes as part of the factual summary. In any event, none of the reproachful footnotes were adequately supported by legal analysis or authority. "Hence, we deem the issue[s] waived. '"Where a point is merely asserted by counsel without any argument of or authority for its proposition, it is deemed to be without foundation and requires no discussion."' [Citation.]" (*People v. O'Neil* (2008) 165 Cal.App.4th 1351, 1355.)

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[5] We are unclear what counsel hoped to gain by inserting lengthy irrelevant footnotes, sarcastic commentary, and attacks on the victim's credibility (when sufficiency of the evidence was not an issue). These tactics were distracting and unhelpful in reaching the merits of the appeal.

III

The judgment is affirmed.

O'LEARY, P. J.

WE CONCUR:

ARONSON, J.

THOMPSON, J.